CHAPTER ELEVEN
MODIFICATION OF CHILD SUPPORT OBLIGATIONS

INTRODUCTION

The passage of time, with the resulting economic changes, can wreak havoc on a child support order that remains constant. Orders that once reflected the needs of the children no longer do so. The financial circumstances of the parents change; the necessity of child care might be eliminated; the costs of food, clothing, medical care, school, and extracurricular activities increase or decrease. This chapter discusses grounds for the modification of support orders, Federal review and adjustment requirements, jurisdiction to modify, and other issues that affect modification.

MODIFICATION IN GENERAL

Child support orders differ from other civil orders that become *res judicata* when the order is final.[1] While modification is not meant to allow parties to relitigate the child support issue, it would be unreasonable to expect that an order entered at a child's infancy would continue to be appropriate for a teenager.

GROUNDS FOR MODIFICATION AND FREQUENCY OF REVIEW

Federal regulations authorize States to establish a standard for modification, either as a dollar amount or percentage, as a basis for determining if the current support order and the proposed new amount calculated under guidelines are so inconsistent as to merit modification.[2] Federal regulations also require States to allow modification to provide for a child's health needs, including health insurance and other expenses, absent a showing of any material change in circumstances.[3]

Change in Circumstances

Traditionally, no modification could be granted unless there was a material change in facts or circumstances since the date of the last order. State law usually imposed no restrictions on the frequency of such modification requests. The relevant factor for the court was whether there had been the requisite change in circumstances. What constituted a change in circumstances sufficient to modify the order depended on the State and the court.[4]

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[1] Alexander S. De Witt, *Make Your Case for Modification*, 23 FAM. ADVOC. 30 (American Bar Association Fall 2000), *citing Nowak v. Trezevant*, 685 A.2d 753 (D.C. 1996).
[2] 45 C.F.R. § 303.8(c) (2000).
[3] 45 C.F.R. § 303.8(d) (2000).
[4] *See, e.g., Mann v. Hall*, 962 S.W.2d 417, 420 (Mo. Ct. App. 1998) (a child support award can only be modified on a showing of changed circumstances so substantial and continuing as to make the terms of the award unreasonable, *citing Buckman v. Buckman*, 857 S.W. 2d 313, 316

With a "change in circumstance" standard, most modification requests required an evidentiary hearing before a court. Research indicates that there were many barriers to the timely modification of orders, including a lack of timely access to courts, the expense of hiring an attorney, a reluctance to "rock the boat," and a fear of other issues being raised, such as custody and visitation. States began to develop *pro se* procedures for modification of orders in an effort to ensure parties had the opportunity to modify of their support orders in a timely manner.[5]

Federal Law

In 1985, a national study concluded that application of two widely accepted guideline models to existing support cases would increase the average order by 2.5 times.[6] Congress responded in the Family Support Act of 1988.[7] First, as a condition of receiving Federal funds, States were required to move from advisory support guidelines to presumptive guidelines. States had to use these guidelines as rebuttable presumptions in both the establishment and modification of support orders. Any deviation from the guideline amount required the decision-maker to make a finding that the application of the guideline would be unjust or inappropriate in the particular case.[8] Second, Congress required States to review their support guidelines at least once every 4 years to ensure that their application continued to result in fair awards.[9] Finally, in an attempt to encourage timely modification of support orders, Congress included a review and adjustment requirement.[10] It required States, as a condition of receiving Federal funds, to review child support orders in all Aid to Families with Dependent Children (AFDC) [now Temporary Assistance to Needy Families (TANF)], Title IV-E foster care, and Medicaid cases at least once every 3 years, unless a review would not be in the best interest of the child. It also required child support enforcement (CSE) agencies to review all non-AFDC IV-D cases at the request of either parent. The Family Support Act set forth detailed notice requirements to

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(Mo. Ct. App. 1993)); *In re Marriage of Kolstad*, No.00-2485, 2001 WL 488078 (Wis. Ct. App., May 9, 2001) (where a stipulated agreement was not working out as the parties had expected because the father's income fluctuated and the expenses of the children had increased as they got older, the petitioner had proven a substantial change to merit modification). States following the Uniform Marriage and Divorce Act required a showing of an unanticipated change of circumstances "so substantial and continuing as to be unconscionable." Unif. Marriage and Divorce Act § 316, 9 U.L.A. 489-90 (1987).

[5] *See* Eleanor Landstreet, *Developing Effective Procedures for Pro Se Modification of Child Support Awards* (U.S. Dep't of Health & Human Services 1991).

[6] Ron Haskins, *et al. Estimates of National Child Support Collections Potential and the Income Security of Female Headed Families,* Report to Office of Child Support Enforcement (Bush Institute for Child and Family Policy, University of North Carolina at Chapel Hill 1985).

[7] P.L. No. 100-485 (1988).

[8] 42 U.S.C. § 667(b)(2) (1994, Supp. IV 1998, & Supp V. 1999).

[9] 42 U.S.C. § 667(a) (1994, Supp. IV 1998, & Supp. V 1999).

[10] 42 U.S.C. § 666(a)(10) (1994, Supp. IV 1998, & Supp. V 1999).

ensure that parents in IV-D cases knew of their right to request a review and to appeal any results of the review.

Federal regulations implementing the Family Support Act requirements emphasized that the standard for modification had shifted from the traditional substantial change in circumstances standard to a guideline standard. In the preamble to the regulation, the Secretary of Health and Human Services stated:

> These provisions evidence Congressional intent to make obtaining an adjustment in the amount of child support easier by requiring a process in which the standard for modification must be related to State child support guidelines. The enactment of these requirements reflects a recognition that the traditional burden of proof for making a change in the amount of support ordered may have contributed to many awards remaining unchanged throughout the life of the order and thus, inadequate or inappropriate with the passage of time. It also signals a need for States to at least expand, if not replace, the traditional "change in circumstances" test as the legal prerequisite for changing the amount of child support to be paid, by making State guidelines the presumptively correct amount of support to be paid.[11]

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[12] and subsequent regulations, revised the review and adjustment provisions. First, it eliminated the requirement that all IV-D cases must be reviewed at least once every 3 years. The law now provides that procedures must be in place for a triennial review at the request of either party or, in an assistance case, at the request of the State.[13] Second, it allowed States to establish a reasonable quantitative standard based on either a fixed dollar amount or percentage, or both, as a basis for determining whether an inconsistency between the existing child support award amount and the guideline amount is adequate grounds for petitioning for adjustment of the order.[14] Finally, PRWORA allowed States to adopt procedures for 3-year reviews that do not require a change in circumstances or a percentage of difference from the prior order.[15] States can use any of three different methods for the review:

- child support guidelines;[16]
- application of a cost-of-living adjustment in accordance with a formula developed by the State;[17] or

[11] 57 Fed. Reg. 61,560 (1992).
[12] P.L. No. 104-193 (1996).
[13] 42 U.S.C. § 666(a)(10)(A) (Supp. IV 1998 & Supp V. 1999).
[14] 45 C.F.R. § 303.8(c) (2000).
[15] 42 U.S.C. § 666(a)(10)(A)(iii) (Supp. IV 1998 & Supp. V 1999).
[16] 42 U.S.C. § 666(a)(10)(A)(i)(I) (Supp. IV 1998 & Supp. V 1999).
[17] 42 U.S.C. § 666(a)(10)(A)(i)(II) (Supp. IV 1998 & Supp. V 1999).

- use of automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment under any threshold that might be established by the State.[18] If child support guidelines are not used, either parent must be allowed to contest the adjustment.[19]

Implementing Federal regulations are found at 45 C.F.R. § 303.8.[20] They further provide that addressing a child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to petition for an adjustment of the order, regardless of whether an adjustment in the amount of child support is necessary.[21]

APPLICATION OF MODIFICATION STANDARDS

Just as States have different guidelines for calculating child support orders, they have various standards for modifying those orders. Some of the most commonly used standards are discussed below.

Change in Circumstances

Courts use many variations of the changed circumstances standard. Some require changed circumstances so substantial and continuing as to make the terms of the existing award unreasonable.[22] Connecticut case law requires parties to "clearly and definitely" demonstrate a substantial change that "was uncontemplated at the time the order was entered."[23] To meet the burden of proof, parties typically must present evidence in the form of itemized bills, pay stubs, and affidavits to support their allegation of changed circumstances.

Changes in income. Increases in income alone might justify an increase in support under State law. Florida courts, for example, have held that children are entitled to share in their parents' good fortune.[24] Other courts have held that an increase in income is not a sufficient basis for an increase in child support; the petitioner must also show an increase in the child's needs.[25] Sometimes the changed income relates to the spouse of one of the parties, for instance, when a parent chooses to stay at home, and can do so, because the spouse provides income.[26] Courts have also considered the reason for the change in income,

[18] 42 U.S.C. § 666(a)(10)(A)(i)(III) (Supp. IV 1998 & Supp. V 1999).
[19] 42 U.S.C. § 666(a)(10)(A)(ii) (Supp. IV 1998 & Supp. V 1999).
[20] 45 C.F.R. § 303.8 (2000).
[21] 45 C.F.R. § 303.8(d) (2000).
[22] *See Mann v. Hall,* 962 S.W.2d 417 (Mo. Ct. App. 1998).
[23] *Kelepecz v. Kelepecz,* 187 Conn. 537, 447 A.2d 8 (1982).
[24] *Miller v. Schou*, 616 So. 2d 436 (Fla. 1993).
[25] *See, e.g., Micheu v. Micheu*, 440 So. 2d 240 (La. Ct. App. 1993).
[26] Va. Code § 20-108.1(B)(1) (2001); Cal. Fam. Code § 4057.5(a) (West 1994).

holding that, where a reduction in income is voluntary, it cannot be the basis for a downward modification.[27]

Some States will impute income in a modification case where the actions of the obligor might have led to the reduction in income or other change in circumstances. A recent Maryland case went so far as to impute income to a parent who was terminated from his job, stating that, based on the earning capacity of the parent and the belief that the unemployment was temporary, the child should not be forced to do without and the parent should temporarily adjust his lifestyle.[28] Other States, Michigan, for example, require that certain statutorily mandated procedures be followed to impute income as the basis for modification.[29]

Incarceration. In many States, incarceration is not a basis for modification. These courts hold that, because imprisonment is the result of an intentional criminal act, incarceration and the loss of income are voluntary acts.[30]

On the other hand, some courts have reached the opposite conclusion. For example, in *Leasure v. Leasure,*[31] the appellate court found that imprisonment was an involuntary act and the incarcerated obligor was entitled to a modification of his support obligation.

Still other courts view the incarceration as just one factor to consider. A Wisconsin court found that, while the incarceration's effect on the obligor's income (reduction of pay from $15.75 an hour to $17 a month) met the change of circumstances criteria, looking at all of the factors, including the period of incarceration, modification was not appropriate.[32] A few State guidelines, such as

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[27] *See, e.g., Edwards v. Edwards*, 615 So. 2d 178 (Fla. Dist. Ct. App. 1993); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Roessler v. Krueger,* No. 00822, 2001 WL 125881 (Wis. Ct. App. Feb. 15, 2001) (court denied motion to modify during incarceration). *But see Bhagat v. Bhagat*, No. 218352, 2001 WL 789182 (Mich. Ct. App. Jan. 16, 2001) (court reversed the lower court's increase in support based on imputed income, finding it was arbitrary and speculative).

[28] *Sczudlo v. Berry*, 129 Md. App. 529, 743 A.2d 268 (1999).

[29] *See* Michigan Child Support Formula Manual (2000), Part II, § I, listing eight factors to be considered in determining whether an individual has an unexercised ability to earn, and Mich. Comp. Laws Ann. § 552.17(2) (West Supp. 2001) for the four-step analysis that includes a calculation of support under the formula using the party's actual income. *See also Bhagat v. Bhagat*, No. 218352, 2001 WL 789182 (Mich. Ct. App. Jan. 16, 2001), *citing Burba v. Burba*, 461 Mich. 637, 647, 610 N.W.2d 873 (2000); *Sword v. Sword*, 399 Mich. 367, 378-379, 249 N.W.2d 88 (1976); *Ghidotti v. Barber*, 459 Mich. 189, 586 N.W.2d 883 (1998).

[30] *See, e.g., Davis v. Vance*, 574 N.E.2d 330 (Ind. Ct. App. 1991);*Toups v. Toups*, 708 So. 2d 849 (La. Ct. App. 1998); *Thomasson v. Johnson*, 120 N.M. 512, 903 P.2d 254 (1995).

[31] *Leasure v. Leasure*, 378 Pa. Super. 613, 549 A.2d 225 (1988). *See also In re Barker*, 600 N.W.2d 321 (Iowa 1999) (mother's incarceration on drug charges constituted a change in circumstance, warranting a downward modification).

[32] *Roessler v. Krueger*, No. 00822, 2001 WL 125881 (Wis. Ct. App. Feb. 15, 2001). *See also Matter of Marriage of Thurmond*, 265 Kan. 715, 962 P.2d 1064 (1998).

those in Kansas and Virginia, specifically address the impact of incarceration on support. [33]

Extended visitation. Several cases have held that modification or abatement of child support is not appropriate during periods of extended visitation or temporary periods of residence with the obligated parent.[34] The basis for these rulings has been that the guidelines already consider an extensive relationship between the child and parent and already allow for periods of visitation. The custodial parent's need to maintain a household for the benefit of the child does not diminish during the visitation or temporary periods.

Other factors. Aside from changes in the employment, income, or other factors that affect the parents, the needs of the child can change as well.[35] Typically, child care costs decrease as a child gets older, which could result in a lower support amount calculated under guidelines. An order for multiple children might need adjustment as one or more of the children emancipate. Changes in medical costs can also necessitate an increase in support. Several States have specific statutory provisions stating that no showing of a change of circumstances is required to address changes to medical coverage.[36]

Other occurrences that might constitute changed circumstances include:

- an increase in the cost of living;
- an illness or disability;
- financial woes; or
- cohabitation or remarriage of the custodial parent.[37]

Consider a recent Wisconsin opinion in which the trial court, affirmed by the Court of Appeals, found that the noncustodial parent had established a substantial change in circumstances, yet held that such a finding, "by itself, does

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[33] *See, e.g.,* Kansas C.S.G., Supreme Court Admin. Order No. 107 (1997 Kan. Ct. R. Ann. 89); *Rupp v. Grubb*, 265 Kan. 711, 962 P.2d 1074 (1998); Va. Code § 20-108.2(B) (2001) There is an exemption to using the presumed minimum income in determining the basic child support obligation where the parent is imprisoned with no chance of parole and insufficient assets from which to pay support.

[34] *See, e.g., Schumacher v. Schumacher,* 589 N.W.2d 185 (N.D. 1999).

[35] *See Zutz v. Zutz*, 208 Wis. 2d 338, 559 N.W.2d 919 (1997) (court refused to modify support that had been based on the parties' agreement, even though both parents had substantial changes in circumstances, because the needs of the child had not changed).

[36] Arizona, Arkansas, Idaho, Illinois, Iowa, Minnesota.

[37] *See Italiano v. Rudkin (Italiano)*, 294 N.J. Super. 502, 683 A.2d 854 (1996) (common law change of circumstances for modification includes an increase in the cost of living, a change in the contributing spouse's income, a subsequent illness or disability, the noncontributing spouse's cohabitation with another, subsequent employment of the noncontributing spouse, changes in Federal income tax law, and maturation of children).

not require modification of the support obligation. It merely gives the court competence to exercise discretion as to whether support should be modified."[38] Modification is not required if the court, in its discretion after viewing all of the evidence, determines that modification is not appropriate.

Threshold Change in Support Amount

Most States include in their child support guidelines a provision that permits modification when there is a threshold difference between the current support amount and the presumptive guideline amount. This threshold amount might be expressed as a percentage or dollar amount, or both.[39]

In Maryland, for example, if the guidelines calculation results in a support amount that is at least 25 percent higher or lower than the current order, that is *prima facie* evidence of the material change in circumstances that Maryland requires for modification.[40] Indiana's statute requires (1) either "a showing of changed circumstances so substantial and continuing" as to make the order terms unreasonable or a guidelines application that results in a 20 percent change in support amount and (2) the passage of least 12 months between the issuance of the current order and the request for modification.[41]

Establishment of a threshold difference might not, in and of itself, be a sufficient basis for modification. The decision-maker can examine other factors as well, including the purposefulness of a party's actions that might have caused the change in income.

With the initial enactment of presumptive guidelines, the question arose whether the enactment of the guideline itself was a sufficient changed circumstance to justify a modification. The question continues as guidelines are periodically reviewed and amended. Some States expressly provide that a

[38] *Roessler v. Krueger,* No. 00822, 2001 WL 125881 (Wis. Ct. App. Feb. 15, 2001) (the court refused to modify the father's child support obligation because of his incarceration, but suspended payment until after his release).

[39] Arizona, 15%; Arkansas, 20% or $100; Alabama, 10%; Alaska, 15%; Colorado, 10%; Connecticut, 15%; District of Columbia, 15%; Florida, 15% or $50, whichever is greater; Illinois, 20%, but not less than $10; Indiana, 20%; Iowa, 10%; Kansas, 10%; Kentucky, 25% until July 14, 2001, then 15%; Maine 15% for orders under 3 years old; Maryland, 25%; Massachusetts, 20%; Michigan, $5 or 10%, whichever is less; Minnesota, 20% **and** $50; Nebraska, 10% where circumstances have persisted at least 3 months and will last at least 6 months; New Hampshire, 20%; New Mexico, 20% and it has been at least 1 year since the last order; New York, 10%; North Carolina, 15% on all orders 3 years and older; Ohio, 10%; Tennessee, 15% on an award of $100 or more, $15.00 on orders under $100; Utah, 10%; Vermont, 10%; Virginia, $10, but not less than $25; and West Virginia, 15%. This information was obtained by reviewing each State's support guidelines. For a direct link to the guidelines in each State, *see* http://www.supportguidelines.com.

[40] Md. Code Ann., Fam. Law § 12-202(b)(2) (1999).

[41] Ind. Code Ann. § 31-16-8-1 (2001).

change in the guideline constitutes a substantial change in circumstances.[42] In other States, however, a change in the guidelines is not considered a change in circumstances.[43] Several States considered the enactment of guidelines as a change in circumstances when they were first enacted, but not when they were later reviewed and amended.[44]

There are States that allow for modification under guidelines pursuant to review and adjustment, without meeting a threshold change or showing a change in circumstances, if the requisite time has passed.[45]

Almost all State guidelines with modification timeframes or thresholds exclude cases in which there was a deviation from the guidelines in the last order.[46]

Cost of Living Adjustment

As noted earlier, PRWORA allows States to use a cost-of-living adjustment (COLA) as a way to meet the periodic review and adjustment requirement.[47] An Indiana case summarizes the advantages of automatic escalator clauses based on the cost of living:

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[42] *See Rowen v. Rowen*, 963 P.2d 249 (Alaska 1998); Miss. Code Ann. §§ 43-19-101 to -103 (2000); S.D. Codified Laws Ann. §§ 25-7-6.1 to -6.17 (1992 & Supp.1997) ("all orders entered prior to July 1, 1997 may be modified in accordance with guidelines without a showing of a change in circumstances"); Wis. Stat. Ann. § 767.25 (West 1995), DWD 40 (1999). *But see Bunn v. House,* 934 P.2d 753, 758 (Alaska 1997) (a change of the method to calculate support in a divided custody case is not a material change of circumstances).

[43] *See* D.C. Code Ann. § 16-916.01(o)(3) (2000) (no modification based on the enactment of guidelines); Md. Code Ann., Fam. Law § 12-202 (b)(2) (1999) ("adoption of guidelines is not a basis for modification"); S.C. Code Ann. § 20-7-852(B) (Law. Co-op. 1997) ("application of these guidelines to an existing child support order, in and of itself, is not considered a change in circumstances for the modification of that existing order except in a Title IV-D case"). *See also* Okla. Stat. tit. 43, § 118(E)(16)(a)(2) (2001) (modification of the guideline schedule will not be considered a change in circumstances).

[44] Cal. Fam. Code § 4057.5(e) ("enactment of this section constitutes cause to bring an action for modification of an order entered prior to the operative date") and § 4069 ((establishment of guidelines constitutes a change in circumstances) (West 1994); Nev. Rev. Stat. § 125B.145(4) (1999) (once guidelines are applied, parties must show a change of circumstances for modification); S.D. Codified Laws Ann. § 25-7-6.13 (1992 § Supp. 1997) ("all orders entered prior to July 1, 2001 may be modified in accordance with this chapter without a change in circumstances"); Wis. Stat. Ann. § 767.32(1)(b) (West 1995) (there is a rebuttable presumption of a substantial change in circumstances … (4) where the percentage standard was not used for the original support order).

[45] Florida, 3 years; Illinois, 36 months; Maine, 3 years; Mississippi, 3 years; Oregon, 2 years; Rhode Island, 3 years; Wisconsin, 33 months.

[46] *See, e.g.,* Ala. R. Jud. Admin. 32 (Supp.1997); In re: Administrative Order No. 10, Ark. C.S.G. (1998); Va. Code §§ 20-108.1 to -108.2 (2001).

[47] *See, e.g., Kendrick v. Childers*, 475 S.E.2d 604 (Ga. 1996); Minn. Stat. Ann. § 518.641(West 2001); N.Y. Dom. Rel. Law § 240(1-b) (McKinney 1990 & Supp. 1993).

> In summary, we approve the court's order prescribing an adjustment in the amount of child support based upon changes in the Consumer Price Index because the provision (1) gives due regard to the actual needs of the child, (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either the custodial parent or the noncustodial parent to petition the court for modification of the decree due to a substantial and continuing change of circumstances.[48]

In States that use COLAs, PRWORA requires that parents have the opportunity to also request a review pursuant to the support guidelines. The Minnesota statute provides for cost-of-living adjustments to the guidelines chart as well as to support orders in existence.[49]

Other States, however, have held that COLAs are void as against public policy. They argue that, because a COLA is tied to national inflation rates and economic indicators, it might not accurately reflect an obligor's changes in income and ability to pay support.[50]

Automated Review and Adjustment

Several States have recognized the benefit of using automation to review and adjust orders. For example, Maine performs automated review and adjustment through an interface with the district court. Using uniform statewide criteria, the interface screens and selects cases for modification; then, it calculates the proper modification and generates the forms. New York and California also use automated review and adjustment.

PROHIBITION AGAINST RETROACTIVE MODIFICATION

Federal law provides that every child support installment becomes a judgment by operation of law as it comes due and is not subject to retroactive modification.[51] This precludes modification of a support order for any period prior to the date of filing the request for modification and notice to the other party. For a noncustodial parent seeking modification, it is important to take timely action to avoid paying a large judgment of arrears, which accumulated prior to the filing.[52] Although some courts have provided equitable relief from these arrears in severe

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[48] *Branstad v. Branstad*, 400 N.E.2d 167 (Ind. Ct. App. 1980).
[49] Minn. Stat. Ann. § 518.641 (West 2001).
[50] *See, e.g., Kelly v. Otte*, 123 N.C. App. 585, 474 S.E.2d 131 (1996).
[51] 42 U.S.C.§ 666(a)(9) (1994, Supp. IV 1998, & Supp. 1999); 45 C.F.R. § 302.70(a)(9) (2000).
[52] *See Houser v Houser,* 535 N.W.2d 882 (S.D. 1995).

hardship situations,[53] other courts have hesitated to do so, concluding that it is tantamount to a retroactive modification and violates public policy.[54]

JURISDICTION

The court or tribunal must have proper jurisdiction to modify an order; otherwise, the modified order will be unenforceable. Whether the tribunal has jurisdiction to modify depends on the circumstances of the case.

Intrastate Cases

The authority of a court to modify a child support order that it issued is derived from the court's continuing jurisdiction over its own order. Not only does a court retain subject matter jurisdiction over its order, it also usually retains personal jurisdiction over the parties. Thus, it is usually sufficient to serve a party by mail, rather than by personal service. States using administrative procedures for review and adjustment must also provide proper notice and an opportunity to respond to the request for modification.

Interstate Cases

A court or agency's authority to modify a support order issued by another State, or to modify its own order when parties no longer reside there, is governed by the laws passed to deal with interstate cases.[55] The Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA)[56] requires States to give full faith and credit to child support orders issued by other States, when the State that issued the order exercised proper personal and subject matter jurisdiction. Both FFCCSOA and the Uniform Interstate Family Support Act (UIFSA)[57] limit the ability of a State tribunal to modify another State's order. Pursuant to Federal and State law, once a State issues a support order, it has continuing, exclusive jurisdiction (CEJ) to modify that order.[58] There are only two exceptions. The first

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[53] *See, e.g., In re Marriage of Jackson,* 682 N.E.2d 549 (Ind. Ct. App. 1997); *O'Connor v. Curcio*, 281 A.D.2d 100, 724 N.Y.S.2d 171 (N.Y. App. Div. 2001) (the parties' agreement expressly waiving child support for the time the child was with the paying father was held to be valid and enforceable; no arrearages accrued because the obligor had paid support directly for the child).

[54] *See Bustos v. Bustos*, 128 N.M. 842, 999 P.2d 1074 (2000) (addressing the issue of an undivided order after emancipation of one of the children covered by the order); *In re. Marriage of Barone,* 100 Wash. App. 241, 996 P.2d 654 (2000) (it would be inappropriate to give credit for arrears accumulated when the child was with the obligor, even though the child was placed with the obligor pursuant to a protective order and the obligor paid all the child's expenses during that time; the protective order did not constitute a *de facto* modification).

[55] *See* Chapter Twelve: Interstate Child Support Remedies for a more detailed discussion of modification in interstate cases.

[56] P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B (Supp. V 1999).

[57] Unif. Interstate Family Support Act (1996) (amended 2001), 9 Pt. 1B U.L.A. 235 (1999) [hereinafter UIFSA].

[58] 28 U.S.C. § 1738B(d) (Supp. V 1999); UIFSA § 205 (amended 2001), 9 Pt. 1B U.L.A. 284-5 (1999).

is when no party or child continues to live in the issuing State. The second is when the parties file a written consent for another State, with which they have a nexus, to exercise modification jurisdiction and assume continuing, exclusive jurisdiction.[59]

In an interstate support case, it is crucial that the CSE attorney review the facts—including where the parties and child are living—to determine which State has jurisdiction to modify. Under FFCCSOA and UIFSA, the following rules apply:

One CEJ State. If there is only one State of continuing, exclusive jurisdiction, either party must seek modification in that State.[60] As long as there is a State with continuing, exclusive jurisdiction, no other State can modify the order—not even if a State has long-arm or continuing jurisdiction.[61] The only exception is if the parties have filed a written agreement.[62]

It is not necessary for the petitioner to physically travel to the State with CEJ for the modification hearing. The petitioner can participate by telephone, facsimile, or other available electronic means.[63]

Multiple CEJ States. If there is more than one State with continuing, exclusive jurisdiction, the responding tribunal must follow the rules of Section 207 of UIFSA to determine the controlling order and the tribunal's jurisdiction to modify the order.

- If there is more than one CEJ State, and one of those CEJ States is the child's home State, then the controlling order is the one issued by the child's home State and that is also the State with exclusive jurisdiction to modify.

- If there is more than one CEJ State and no State with an order can be considered the child's home State, the controlling order is the most recent order. The State that issued the most recent order is the State with exclusive jurisdiction to modify.

No CEJ State. If there is only one support order and no CEJ State, the person seeking modification must register the order in a State, other than his or her own State, with personal jurisdiction over the other party.

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[59] UIFSA § 205(a)(1) and (2) (amended 2001), 9 Pt. 1B U.L.A. 285 (1999). *See, e.g., Bednarsh v. Bednarsh*, 282 N.J. Super. 482, 660 A.2d 575 (1995).
[60] UIFSA § 205 (amended 2001), 9 Pt. 1B U.L.A. 284-5 (1999). *See, e.g., Office of Child Support Enforcement v. Cook*, 60 Ark. App. 193, 959 S.W.2d 763 (1998); *Peddar v. Peddar*, 43 Mass. App. Ct. 192, 683 N.E.2d 1045 (1997); *Porter v. Porter*, 684 A.2d 259 (R.I. 1996).
[61] UIFSA § 205 (amended 2001) cmt., 9 Pt. 1B U.L.A. 285 (1999). *See also* John J. Sampson, *Uniform Interstate Family Support Act* (1996) (with more Unofficial Annotations by John J. Sampson)," 32 FAM. L.Q. 385, 434- 437 (Summer 1998).
[62] UIFSA § 205(a)(2) (amended 2001), 9 Pt. 1B U.L.A. 285 (1999).
[63] UIFSA § 316(f) (amended 2001), 9 Pt. 1B U.L.A. 327-8 (1999).

If there are multiple support orders but no CEJ State, there is no controlling order. Therefore, the petitioner seeking a different support amount must file a petition to establish a support order in a State with jurisdiction over the respondent. If applicable, the petitioner can also register the existing orders for enforcement of arrears. See Exhibit 12-3.

Exceptions. In addition to the written consent exception, there are two other exceptions to the rules for modifying a child support order. The first applies only in international cases. If the issuing State with CEJ is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to UIFSA, a State tribunal can assume jurisdiction to modify the child support order without the written consent of the individual party residing in the UIFSA State.[64] The second exception applies when there is no CEJ State and all of the parties and child now reside in the same State. In that situation, the party seeking modification can register the order in the State where the parties reside; the registration requirement that the petitioner be a nonresident does not apply.[65]

Choice of law. When a State properly assumes jurisdiction to modify, it must apply its own law regarding modification procedures and defenses.[66] It also applies its own support guidelines.[67] Pursuant to UIFSA, however, even if a tribunal has jurisdiction to modify a support order issued by another State, it cannot modify any aspect of the order that would be nonmodifiable in the State that issued the order established as controlling under Section 207 of the Act.[68] An example of a nonmodifiable term in most States is the duration of the support obligation.[69]

ADMINISTRATIVE MODIFICATION OF JUDICIAL ORDERS

The existence of both judicial and administrative procedures for modification has brought to light legal issues regarding the ability of an administrative body to modify judicial orders. Based on their definitions of "court" and "tribunal," FFCCSOA and UIFSA provide for administrative modification of judicial orders in interstate cases. The determination of the appropriateness of administrative modification of a judicial order in any State will be based on State law, particularly the State constitution.[70]

[64] UIFSA § 611(a)(2) (shifted to a new provision § 615 in 2001), 9 Pt. 1B U.L.A. 369 (1999).
[65] UIFSA § 613, 9 Pt. 1B U.L.A. 378 (1999).
[66] UIFSA § 611(b), 9 Pt. 1B U.L.A. 369 (1999).
[67] UIFSA § 303(1) (amended 2001), 9 Pt. 1B U.L.A. 303 (1999).
[68] UIFSA § 611(c) (amended 2001), 9 Pt. 1B U.L.A. 370 (1999).
[69] UIFSA § 611 cmt., 9 Pt. 1B U.L.A. 370 (1999).
[70] For additional information, see Chapter Six: Expedited Judicial and Administrative Processes.

PROVISION OF SERVICES

Pursuant to Federal regulations, services of the CSE agency must be made available to any individual who files an application for services and the State must provide all appropriate services.[71] These services can include review of the support amount and adjustment, where appropriate.[72]

CONCLUSION

The life of a child support order can be very long, seeing a child from infancy through to adulthood. During that time, the circumstances of the parties and the needs of the child can change dramatically. Clearly, a child support order that is appropriate at the time of entry may be inappropriate several years later. Modification of child support orders helps address these changes over time and is vital to ensuring that the child support order remains appropriate for the parties and the child throughout the order's duration.

[71] 45 C.F.R. § 302.33(a) (2000).
[72] For a discussion of the ethical considerations of this requirement, see Chapter Three: State and Local Roles in the Child Support Enforcement Program.

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